IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 963 of 2006

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DR. PURSHOTTAM SWAROOPCHAND SONI - Applicant(s)

Versus

THE STATE OF GUJARAT - Respondent(s)

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Appearance :

MR SV RAJU with MR VIRAT G POPAT, Advocates for Applicant
MR SUNIT SHAH, PUBLIC PROSECUTOR with MR P.D. BHATE, APP for Respondent no.1.

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 05/04/2007

ORAL CAV JUDGMENT

1.0 The petitioner has prayed to quash and set aside the judgement and order dated 3rd June 2006 passed below Exhibit 41 in Sessions Case No.160 of 2002 by the Additional Sessions Judge, Viramgam and to direct that further investigation be made by an independent agency unconnected with present investigation machinery to conduct Brain Mapping/Brain Finger Printing Test of the accused.

2.0 The petitioner had lodged First Information Report being C.R. No.I 30 of 2002 with Mandal Police Station in connection with the murder of his wife on 25th June 2002. During the course of investigation the petitioner came to be arrested in connection with the said complaint on 30th June 2002.

2.1 According to the Investigating Officers, the petitioner has taken the officers to the place where allegedly he had hidden his clothes and weapon of the crime. According to the investigating agency, they have recovered “Surgical Blade” and “bloodstained clothes of the accused”.

However, according to the petitioner, the recovery of the said articles were not made at the instance of the petitioner and according to the Panchnama, the weapon which was recovered after 8 days of the incident had fresh bloodstains on it. Therefore, according to the petitioner, the aforesaid Panchnama is false and the petitioner has been framed in the matter.

2.2 In view of the above, the petitioner has submitted an application Exhibit 41 before the Sessions Judge, Viramgam, praying for further investigation in the matter and for an order that he may be subjected to brain mapping test by an independent investigating agency unconnected with the present investigating agency. The Additional Sessions Judge, Viramgam, rejected the said application by order dated 3rd June 2006 against which the present petition has been filed.

3.0 Mr. S.V. Raju, learned Advocate for the petitioner submitted that the so-called discovery made at the instance of the petitioner is not actually made at the instance of the petitioner and the whole factum of the discovery is fabricated by the investigating agency. He submitted

that this contention is supported by the fact that the alleged discovery of ”Surgical Blade” was made after about eight days from the date of incident, but according to the Panchnama, it is having fresh bloodstains. However, no investigation has been made with regard to fresh bloodstains by the investigating agency.

3.1 He further submitted that the Sessions Court has erroneously rejected the application for Brain Mapping test on the ground that it would delay the trial. Mr. Raju further submitted that the petitioner is facing serious charge of offence of murder which is punishable with capital punishment and since the petitioner is innocent, in order to establish his innocence, Brain Mapping Test/Brain Finger Printing Test would be necessary.

3.2 Mr. Raju submitted that in the present case it is the case of the accused that he has been falsely involved in the matter to save a sitting Minister/her relative. It is his case that a false case of discovery/recovery has been made out after a lapse of almost 10 days.

According to him the entire case is based on circumstantial evidence and there is no eye-witness to the incident of murder. He submitted that there is no direct evidence against the accused involving him in the alleged murder and since a sitting Minister is involved, the police have conducted a biased investigation with the sole purpose of saving the Minister and falsely implicating the petitioner.

3.3 He further submitted that the prosecution was not sure of its position and therefore had asked for a lie-detection test at the stage of investigation and though the accused had very early, while in jail, requested for a lie-detection test, the same was not carried out only with a view to save important personalities whom the prosecution wants to protect.

3.4 Mr. Raju has relied upon a decision in the case of Hasanbhai Walibhai Qureshi Vs. State of Gujarat, reported in 2004(5) SCC 347 wherein the Apex Court held that, coming to the question whether a further investigation is warranted, the hands of investigating agency or

the court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object is to arrive at the truth.

3.5 Mr. Raju has submitted that it is the fundamental right conferred on every person, including an accused to have a fair and open trial. In this regard he has relied upon a decision of the Apex Court in the case of T.C. Pathak Vs. State of U.P. And others reported in 1995(6) SCC 357. He further submitted that the Apex Court has also held that under the right conferred by Article 21 of the Constitution of India, if the liberty of a person is deprived otherwise according to the procedure established by law, then the Court should interfere.

3.6 Mr. Raju has relied upon the decisions in the cases of Maneka Gandhi V. Union of India, reported in 1978 (1) SCC 248, Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra, reported in (2005)5 SCC 294 and Francis Coralie Mullin V. Administrator, U.T. of Delhi, reported in 1981 (1) SCC 608 wherein the Apex Court has interpreted

the expression “procedure established by law” to mean a procedure which should not be arbitrary, unfair or unreasonable.

3.6 Mr. Raju has next relied upon a decision in the case of S.N. Dube Vs. N.B. Bhoir, reported in 2000(2) GLH 420, wherein also the Apex Court has ordered for further investigation.

4.0 Mr. Sunit Shah, learned Government Pleader appearing for the respondent-State submitted that the application for Brain Mapping Test was given only with a view to kill time so that the Sessions Case pending before the Viramgam Sessions Court cannot proceed.

4.1 He submitted that the investigation sought for is not for further investigation, but it is for reinvestigation or for fresh investigation which cannot be allowed. He submitted that the powers of the further investigation are with only the investigating agency and that too for further investigation so that it can collect more evidence.

4.2 Mr. Shah submitted that reading of section 173(8) of Cr.P.C.

makes it clear that the powers of the Court are for further investigation, but not for re-investigation or fresh investigation. According to him, the Sessions Judge has discussed the facts on record in detail and has rightly rejected the application of the petitioner by assigning cogent and convincing reasons.

4.3 He further submitted that the petitioner is not interested in facing trial and the application has been filed only for delaying the prosecution.

4.4 Mr. Shah further submitted that this petition has been filed after a period of four years showing his readiness for Brain Mapping Test and this is made only for prolonging the trial. He further submitted that brain mapping test can never be a defence and therefore such a request cannot be granted.

4.5 Mr. Sunit Shah submitted that the brother-in-law of the petitioner was star witness of the prosecution, but after the petitioner was released on bail, the brother-in-law has tendered an application for reinvestigation and has stated that his brother-in-law has not committed the murder and

this itself goes to show that the petitioner has tampered with the witness. He therefore submitted that the present petition requires to be rejected.

5.0 Mr. Shah has relied upon a decision of the Apex Court in the case of Union of India Vs. Sushil Kumar, reported in 1998(8) SCC 661 wherein it is held that once the chargesheet is filed, it is the trial court alone, which can call for further investigation if at all required and not the High Court or Supreme Court.

5.1 Mr. Shah has next relied upon a decision in the case of Sadi Thomas Vs. State in Appeal (Cri) 1211 of 2006 dated 24.11.2006 wherein the Apex Court has drawn a distinction between adjudicator's function and the function of investigation and stated that it is the prerogative of the investigating authority as to how investigation is to be carried out and the Court's power under adjudicators' function are very limited. In this context he has also relied upon a decision in the case of State of Bihar Vs. A.S. Saldana, reported in 1980 SC 326.

5.2 Mr. Shah has also relied upon a decision of the Apex Court in the

case of K. Chandrashekhar V.State of Kerala reported in 1998 SCC (Cri.) 1212 wherein the Apex Court pointed out distinction between further investigation and reinvestigation.

6.0 There is no dispute about the fact that the petitioner is disputing the contents of Panchnama and his case is that he has been framed in the present case. The alleged discovery of “Surgical Blade” was made after about eight days from the date of incident. The Panchnama shows that it was having fresh bloodstains on it. However, no investigation has been made with regard to the said fresh bloodstains. Earlier brother-in-law of the petitioner had given statement alleging that the petitioner had committed murder of his sister i.e. wife of the petitioner. Thereafter he turned hostile and filed an application seeking further investigation under section 173(8) of the Criminal Procedure Code before the Sessions Court at Viramgam. The said application came to be rejected. According to the prosecution, it was after the petitioner was released on bail the said witness has changed his version. However, there is nothing on record to show that the petitioner has in any manner influenced his brother-in-law to change his version, when earlier he categorically

stated that the petitioner has committed murder of his sister. In such case two hypothetical conclusion can be arrived at. Either the petitioner has prevailed upon his brother-in-law or his brother-in-law must have reasonable belief that the petitioner has not committed the alleged offence. Therefore he has filed the application for further investigation.

6.1 However, the fact remains that the chargesheet has already been filed in the case. From the papers it appears that the Investigating Agency has recorded various statements and certain discovery was also made. Looking to the manner in which the investigation proceeded it cannot be said that there is complete failure of justice in the investigation. It is not for any Court to state as to how the investigation should be carried out. It is the prerogative of investigating authority as to how the investigation is to be carried out. Further, as regards the fresh bloodstains on the weapon, etc. are concerned, the same can be pointed out at the time of trial in the defence of the petitioner. Therefore, I am of the view that no case is made out for further investigation in the matter.

7.0 At this stage it is required to be noted that in the present case the petitioner is the accused. It is also important to note that the accused is demanding Brain Mapping Test/Brain Fingerprinting to prove his innocence. Brain Fingerprinting is based on the principle that the brain is central to all human acts. In a criminal act, there may not be many physical evidences at the crime scene, but the “brain” is always there recording the sequences of the crime. The basic difference between a criminal and innocent person is that the criminal has the details of the crime stored in his brain, whereas the innocent does not. In brain fingerprinting testing, the subject is made to sit in a quiet room with sensors on his headband that measure electrical brain responses. Three types of stimuli: “targets”, “irrelevant”, and “probes”, in the form of words, pictures, or sounds are presented for a fraction of a second each, under computer control. Incoming stimulus that is significant and noteworthy results in a specific, electrical brain response, known as P-300, which is one aspect of a larger brain wave response known as MERMER (Memory and Encoding Related Multifaceted Electroencephalographic Response). However, determination of

innocence or guilt is a legal entity rather than a scientific determination. The investigating agencies can take the results of “Brain Fingerprinting” as an evidence along with all other available evidence to reach a verdict of guilty or not guilty. According to a study the accuracy rate of this test is 99.99 per cent and in USA, the FBI have been making use of this technique to convict criminals.

7.1 According to the petitioner he has been falsely involved in the case and he disputes recovery of weapon at his instance. It is also required to be noted that the petitioner is facing serious charge of offence of murder, which is punishable with capital punishment. The petitioner-accused himself volunteers for the Brain Mapping Test/Lie Detector Test. For a fair trial all possible evidence is required to be brought on record to decide whether the accused is guilty or not. Denying any opportunity to bring on record certain evidence on the ground that the trial will be delayed would amount to denying substantial justice to an accused especially when he is facing a murder trial. On the contrary, if the Lie Detector Test/Brain Mapping Test is allowed, and if it

is presumed that the said test is in his favour, that will not exonerate the petitioner-accused. The evidence is required to be considered in their totality. It cannot be said that merely on Lie Detector Test/Brain Mapping Test the petitioner-accused will be acquitted even though other evidence against him are on record. Looking to the particular facts of the case, especially when the petitioner accused specifically pleaded for Brain Mapping Test, I am of the view that, such an opportunity cannot be denied on the ground that the trial will be delayed. It is also required to be noted that unless it is proved that the petitioner-accused is guilty, the presumption is always in his favour. Even if the Lie Detector Test/Brain Mapping Test is allowed, at the most it may happen that the trial may be delayed by a few days. Moreover, if the Test allowed, justice will be done to the petitioner and the prosecution can have no grievance about the test.

7.2 Under Article 21 of the Constitution of India, it is the fundamental right conferred on every person, including an accused to have a fair and open trial. The scope of Article 21 has received a liberal and expansive

interpretation from time to time by the Apex Court and fair trial is the essence of the fundamental right conferred to every person under the Constitution. Under the right conferred by Article 21 of the Constitution of India, if the liberty of a person is deprived otherwise according to the procedure established by law, then the Court can interfere in the matter.

7.3 On the facts of the case, it is the case of the petitioner-accused that he has been falsely involved in the matter to save a sitting Minister/her relative. According to the petitioner a false case of discovery/recovery has been made out after a lapse of almost 10 days. Prima facie it appears that the entire case is based on circumstantial evidence and there is no eye witness to the incident of murder. It is also true that there is no direct evidence against the accused involving him in the murder. The petitioner had earlier requested for lie-detection test at the stage of investigation, but the same was not carried out.

7.4 It is required to be noted that the right of the accused to give evidence to prove his innocence not only flows from the principles of

natural justice, which is now held to be a part of Article 14/21 of the Constitution of India, but also under section 315 of the Code of Criminal Procedure. Giving of evidence cannot be restricted only to giving of oral testimony in Court. In this century, electronic usage has been accepted in judicial dispensation. I am of the view that in a matter where it is the case of the accused that he is falsely involved, he should be permitted to give evidence in any form whether it be in the form of oral deposition before the Court or in the form of scientific nature like that of Brain-mapping test. To deprive the accused of such a right would tantamount to violation of his fundamental rights.

7.5 It is also required to be noted that undue interest has been taken in the matter by the State. A special Senior Prosecutor has been appointed in the matter. Umpteen number of affidavits and documents were placed on record. The request for brain-mapping test has been objected by tooth and nail. Admittedly the prosecution has failed to show any prejudice being caused in case of Brain-mapping test is allowed. The fact that the State opposes the Brain-mapping test raises doubt

about the conduct of prosecution.

7.6 A contention has been raised that if this application is allowed, it would encourage number of persons to file similar applications. However, it is a well known fact that very few accused resort to this provision and give evidence. It cannot be presumed that the brain-mapping test would be in favour of the accused. In fact a guilty accused would be wary of allowing himself to undergo brain-mapping because it would prove his guilt. Another aspect is the fact that the entire purpose of criminal law and prosecution is to find out the truth and if for the purpose of finding out the truth, brain-mapping is resorted to, the so-called apprehension cannot come in the way of the ultimate aim of finding out the truth.

7.6 According to the respondent, the brain-mapping is only a psychological test and is not an evidence. This argument cannot be accepted. In the recent past in number of cases brain-mapping test has been carried out. As to whether the results of brain-mapping test can be

treated as evidence or what evidentiary value is to be given to such test is a matter to be decided by the trial court. However, the right to produce such evidence cannot be deprived merely because the prosecution at this stage believes that the evidence is inadmissible. The question is not of inadmissibility of evidence, but the question is of what weightage is to be given to the brain-mapping test, which is for the trial court to decide. I am of the view that on this ground such evidence cannot be prevented from coming on record.

7.7 It is also required to be noted that the respondent has failed to prove any prejudice which may be caused to it by the accused undergoing a brain-mapping test. On the contrary, if the brain-mapping test goes against the accused, it would support the prosecution case. It is also required to be noted that the prosecution itself at the initial stage had asked for a polygraph test which is a very raw test as compared to a brain-mapping test and despite the fact that the accused had written from the jail that he wants his polygraph or lie-detection test, the same was not conducted and no reasons are forthcoming for not doing so. It is

also required to be noted that there is no substance in the argument that it would delay the trial. The application for brain-mapping has been given much before the trial has begun. Even from the jail in the year 2002 the petitioner-accused had asked for a lie-detection test which was not carried out. I am therefore of the opinion that if a brain-mapping test is allowed, no prejudice is likely to be caused to the prosecution.

8.0 In the premises the petition is partly allowed. The prayer for further investigation is rejected. However, the investigating authority shall conduct Brain Mapping/Brain Finger Printing Test of the petitioner-accused as requested by the petitioner as expeditiously as possible. Rule is made absolute to the aforesaid extent. D.S. permitted.

[K.S.JHAVERI, J.]

FURTHER ORDER:

After the pronouncement of the judgment, Mr. Shah learned Public Prosecutor requests for stay of this order for a reasonable period. In my opinion, no prejudice would be caused to the State if the said Test is conducted on the petitioner. Such request made by the learned Public Prosecutor is not only unacceptable but, also unreasonable. Hence, the request is rejected.

[K. S. JHAVERI, J.]

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